

Red Carpet Building Maintenance Corp. and Industrial, Technical and Professional Employees Division, National Maritime Union of America, AFL-CIO, Petitioner. Case 31-RC-5301

September 20, 1982

DECISION AND ORDER DIRECTING HEARING

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

Pursuant to a Stipulation for Certification Upon Consent Election executed by the parties, and approved by the Regional Director for Region 31 of the National Labor Relations Board on April 7, 1982, an election by secret ballot was conducted on April 23, 1982, among the employees in the stipulated unit. Upon conclusion of the balloting, the parties were furnished with a tally of ballots which shows that, of approximately 59 eligible voters,¹ 49 cast ballots, of which 20 were for, and 28 against, the Petitioner. There was one challenged ballot, a number insufficient to affect the election results. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 31 conducted an investigation and, on May 28, 1982, issued and duly served on the parties his Report on Objections. In his report, the Regional Director, while recommending that the Petitioner's Objection 2 be overruled, further recommended that the election be set aside on the basis of the Petitioner's Objection 1. The Regional Director also recommended that, in the event that the Board finds no merit to either of these objections, a hearing be held to resolve issues raised by "Other Investigative Disclosures" pertaining to certain alleged Employer conduct that, although not specifically urged as objectionable by the Petitioner, may have interfered with the election results. Thereafter, the Employer filed timely exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act, as amended, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The tally of ballots incorrectly states that there were approximately "48" employees eligible to vote in the election.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties have stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Employer at Fort Irwin, California; excluding office clerical employees, packing and crating employees, guards and supervisors as defined in the Act, as amended.

5. The Board has considered the Regional Director's report, the Employer's exceptions and brief, and the entire record in this case, and hereby adopts the Regional Director's findings and recommendations, except as modified herein.²

The Petitioner contends in its Objection 1 that it did not receive in timely fashion a list of the employees eligible to vote in the instant election, as required by *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).³ In sustaining this objection, the Regional Director concluded that the Petitioner's late receipt of the list apparently was attributable to the Board's own error and to slow mail service. The Regional Director thus found no substantial compliance with the *Excelsior* rule because the Petitioner received the list only 6 days before the election in a unit composed of approximately 59 employees. He relied on evidence that the Petitioner repeatedly sought the list for campaign purposes and that the Petitioner had difficulty communicating effectively with the unit employees following its receipt. Accordingly, even though the Employer submitted the list within the required time limit, the Regional Director recommended setting aside the election results, citing *American Laundry Machinery Division, a McGraw Edison Company*, 234 NLRB 630 (1978), and *The Coca-Cola Company Foods Division*, 202 NLRB 910 (1973). We find merit in the Employer's exceptions to these findings for the reasons set forth below, and we shall overrule the Petitioner's Objection 1.

The Regional Director's investigation disclosed that on March 30 and April 1, 1982,⁴ respectively,

² In the absence of exceptions thereto, we adopt the Regional Director's recommendation that the Petitioner's Objection 2 be overruled.

³ The *Excelsior* rule requires that, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties, or after the Regional Director or the Board has directed an election, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. 156 NLRB at 1239-40. Such list is then forwarded to the union.

⁴ All dates are in 1982, unless otherwise indicated.

the Employer and the Union entered into a Stipulation for Certification Upon Consent Election agreement, which provided that the election be held April 23. On April 7, the Regional Director approved the parties' election agreement and then informed the Employer that an *Excelsior* list was due at the Board's Regional Office in Los Angeles, California, on or before April 14. The Petitioner contacted the Regional Office the following day and requested the date for delivery of the list. The Board agent, who apparently assumed that the Regional Director had approved the stipulation on April 5, incorrectly advised the Petitioner that the list was due on April 12. The Petitioner again called concerning the list on April 14, and was told that the Regional Office would receive it that day.

Later, on April 14, the Employer furnished the *Excelsior* list to the Regional Office. The list was mailed to the Petitioner's office in San Francisco, California, the next day. On April 15, the Petitioner informed the Regional Office that it had not yet received a copy of the list. The Regional Office responded that the list had been mailed that day and that the Petitioner should receive its copy the following day, April 16. When the Petitioner still had not received the list by April 16, the Regional Office immediately sent a second copy of the list via express mail to the union agent's home address at her request. This copy of the list was delivered to her Saturday, April 17. On the following Monday, the Petitioner received at its San Francisco office the copy of the *Excelsior* list which the Regional Office had mailed on April 15.

Contrary to the Regional Director, we conclude that any delay in the Petitioner's receipt of the eligibility list did not frustrate the purposes which the *Excelsior* rule was intended to achieve. Here, on April 1, the Petitioner voluntarily entered into a stipulation providing for a representation election 22 days later. By agreeing to hold the election at an early date, the Petitioner presumably chose to maximize the impact among employees of its prior organizing activities which had led to the filing of the petition. By doing so, however, with the election scheduled in such a brief time frame, the Petitioner sacrificed the opportunity for prolonged utilization of the *Excelsior* list.

On April 14, only 9 days before the election, the Petitioner learned for the first time that the list was not due in the Regional Office until the close of business that day. Allowing time for mail service between the Los Angeles Regional Office and the Petitioner's San Francisco location, a distance of about 400 miles, the Petitioner reasonably could not have anticipated postal delivery of the list before April 16, at the earliest. Nevertheless, the

Petitioner failed to make special arrangements expediting its receipt of the list or to urge that the Regional Director take any such action.

As it happened, the Regional Office did not mail the list to the Petitioner until April 15. While it would have been better practice for the Regional Office to have sent the list immediately upon receipt, we do not agree with the Regional Director's characterization of its failure to do so as constituting "inadvertent delay" that would warrant setting aside the election results. Furthermore, the Petitioner's subsequent receipt of the list, on April 17, came no more than 1 day later than it might have arrived by mail service if the Regional Office had acted immediately.

We therefore reject the Petitioner's contention that its late receipt of the *Excelsior* list requires that the election be set aside. If the employees, as the Petitioner asserts, were difficult to contact because they reside in remote desert areas, the Petitioner knew this at the time it agreed to the date for the election and therefore assumed the consequences of its agreement. That the Petitioner thereafter sought the eligibility list for campaign purposes is clear, but it took no affirmative steps to obtain a copy until 7 days before the election. Even assuming the Regional Office's failure to mail the list upon receipt caused the Petitioner to receive it 1 day late, the Petitioner has not established that it was prejudiced materially in its ability to communicate with employees by this minor delay. We note that at no time did the Petitioner request that the election be postponed because of its late receipt of the list. The Petitioner had the list in its possession 6 days before the election in a relatively small unit, and had sufficient time to mail notices to employees on April 17 and 19 of meetings it held on April 21 and 22. Given these circumstances, we find no basis for concluding that the Petitioner was prejudiced by the 1-day delay in its receipt of the list.

We also conclude that the cases relied upon by the Regional Director are distinguishable from the instant case. In *McGraw Edison, supra*, the Regional Office received the list 1 day late and then delayed another 4 days before mailing it to the union. The union finally received the list 5 days after it was sent, 8 days before the election. Thereafter, it sought to postpone the election, but the employer would not agree to do so. In sustaining the union's objection based on the late receipt of the list, the Regional Director, whose report the Board affirmed, noted that the unit size was about 197 employees; that the particular style of the organizing campaign made timely receipt of the list of great importance to the union; and that the union had demonstrated the reliance it was placing on the list

by seeking to postpone the election. Compared to that case, any delay that occurred here was insignificant. The Petitioner also has not shown in the circumstances here that its election campaign, in a unit smaller than that in *McGraw Edison*, was affected materially by its late receipt of the list. Furthermore, unlike the union in *McGraw Edison*, the Petitioner never sought to postpone the election. In *Coca-Cola Company Foods Division, supra*, the employer furnished the *Excelsior* list on time, but the Regional Office misaddressed the union's copy so that the list was not received until 3 days before the election, a much more substantial delay than that present here.

In its exceptions, the Employer also contends that the Regional Director acted improperly in considering evidence of certain conduct, which does not relate to any objection filed, as possible grounds for setting aside the election results. The Board's established policy, however, "permits a Regional Director to set aside an election based on conduct which he has discovered during his investigation, even though that particular conduct had not been the subject of a specific objection." *American Safety Equipment Corporation*, 234 NLRB 501 (1978); see also *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978). Accordingly, we adopt the Regional Director's recommendation that a hearing be

held to resolve issues raised by "Other Investigative Disclosures."⁵

ORDER

It is hereby ordered that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by "Other Investigative Disclosures."

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of facts, and recommendations to the Board as to the disposition of said objections. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of the exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 31 for the purpose of conducting such hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

⁵ Chairman Van de Water would not consider conduct which has not been specifically and timely alleged to be objectionable, in accord with the position set forth in the dissent in *Dayton Tire & Rubber Co., supra*. Accordingly, he would certify the results of the election.